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IN THE

Supreme Court of the United States

October Term, 1964

No. 404

GERARDO A. RE, also known as JERRY A. RE,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

HARRIS B. STEINBERG
Counsel for Petitioner
25 Broad Street
New York, N. Y.

32 CASE PRESS INC., 421 Hudson St., N.Y.—ORegon 5-4540

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No.

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—v.—

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Gerardo A. Re, also known as Jerry A. Re, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in a case entitled *United States of America* v. *Gerardo A. Re, a/k/a Jerry A. Re, Gerard F. Re, Charles A. Casagrande, a/k/a Charles A. Grande and Ely Batkin* on July 24, 1964 (*Appendix B, infra*, p. 29a).[1]

Citations to Opinions Below

There was no opinion in the District Court. The opinion of the Court of Appeals is set forth in *Appendix A* hereto, *infra*, p. 1a, and is not yet officially reported.

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1. References in parentheses, unless otherwise indicated, are to pages of the Appendices annexed to this petition. For the most part, however, references will be found, entitled "Appellants' Appendix". These are to pages of the combined Appendix submitted on behalf of the Appellants in the Second Circuit Court of Appeals.

Jurisdiction

The judgment of the Court of Appeals was entered on July 24, 1964 (*Appendix B, infra*, p. 29a). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

Questions Presented

1. Whether the Government may confer with and use the testimony of an important witness, knowing that he is then being represented, advised and counseled by an attorney who became privy to the secrets and confidences of the defendants during the period when that attorney had represented the defendants in answering Government charges similar to those in the indictment.

2. Whether the anti-manipulation provisions of the Securities Exchange Act of 1934, as applied to specialists on a national securities exchange, whose legitimate function of interfering with the normal supply and demand of the market is recognized but not adequately defined by that Act, are so vague, indefinite and conflicting as to violate the Due Process Clause of the Fifth Amendment, in that they do not furnish an adequate guide to one who would conform his conduct to the law.

Constitutional Provisions, Statutes and Canons of Ethics Involved

The petition raises issues under Amendments V and VI to the Constitution, the Securities Exchange Act of 1934, c. 404, §§ 9-11, 48 Stat. 889-91 (15 U.S.C. §§ 78i-78k), and Canons 6 and 37 of the Canons of Professional Ethics. The foregoing provisions are all set forth in *Appendix C, infra*, pp. 31a *et seq.*

Statement of the Case

Proceedings

The petitioner, Jerry A. Re (hereinafter "Re, Sr."), and his son, Gerard F. Re (hereinafter "Re, Jr."), both formerly specialists on the American Stock Exchange, were indicted for conspiring to violate certain sections of the Securities Act of 1933 and the Securities Exchange Act of 1934,[2] and for selling 8,900 shares of a certain stock known as "Swan Finch," on the Exchange floor. These shares, admittedly, had not previously been registered with the Securities and Exchange Commission. The Government claimed that they required registration, while the defense contended that they were exempt from registration, or that the defendants, in good faith, believed that they were exempt. The indictment was filed in the United States District Court for the Southern District of New York on April 2, 1962, and included as defendants and conspirators not only the Res but also Lowell M. Birrell, alleged to be a principal figure in the conspiracy; Charles A. Grande, a friend of the Res; Ely Batkin and Jacob Yaffe, alleged principals in an over-the-counter brokerage house; and Verna Skoglund, Birrell's former secretary. The trial commenced before Judge DUDLEY B. BONSAL in the absence of Birrell, who was then a notorious fugitive, living in reputed comfort in Brazil outside the reach of the United States Government. The trial covered a period of ten weeks and resulted in a directed judgment of acquittal as to Mrs. Skoglund and the conviction of all

2. c. 38, Title I, §§ 5(a) and (c), 17(a), 24, 48 Stat. 77, 84, 87 (15 U.S.C. §§ 77e[a] and [c], 77q[a], 77x); c. 404, §§ 9, 10(b), 32(a), 48 Stat. 889-891, 904 (15 U.S.C. §§ 78i, 78j[b], 78ff[a] and Rule 10b-5 of the S.E.C. (17 C.F.R. § 240.10b-5).

the other defendants on the conspiracy count and on the one substantive count on which each was tried.

On September 10, 1963, the Res and Batkin were sentenced to prison terms of six months and fines of $10,000 and $5,000 on the conspiracy and substantive counts, respectively. Grande was not sentenced to a prison term, but the same fine was imposed on him. Yaffe received a suspended sentence. The Res and Batkin appealed from the judgments on both counts upon which they had been convicted, and Grande appealed only from his conviction on the substantive count. On July 24, 1964, the Court of Appeals reversed Batkin's conviction on the substantive count for insufficiency of the evidence and affirmed all the other convictions.

Outline of the Case

Basic to the Government's case were its allegations concerning the financial activities of Lowell Birrell from 1954-1957: his acquisition of Swan-Finch Oil Corp., an old company with pre-existing unlisted trading privileges on the American Exchange; his issuance of, and his acquisition of control over, more than one million shares of Swan-Finch stock; his pledging of much of the stock as collateral for loans which he used to run his business empire; the ultimate distribution to the public, without prior registration, of approximately 800,000 of those shares with the aid of the defendants on trial, and his manipulation of the price of the stock on the American Exchange to assist in the sales or in maintaining the loans.

More than 600,000 Swan-Finch shares, emanating from various corporations controlled by Birrell or individuals allied with him, were sold on the American Exchange

through 21 brokerage accounts managed or controlled as to Swan-Finch activity, by the Res. Nearly 500,000 of those shares went through the account of the Res' friend and co-defendant, Charles Grande. During this time the Res were the Exchange's specialists in Swan-Finch, having become such when Birrell took control of the company.

Approximately 200,000 shares were sold through an over-the-counter brokerage firm, Sinclair Securities, with which co-defendants Batkin and Yaffe were identified, and another 100,000 shares were sold through two other such firms, which were named as co-conspirators but not as defendants.

Unlike most such stock-distribution prosecutions, there was no evidence of fraudulent representations about the stock or the company in order to induce the sales, nor was there any proof of looting of the company's assets. Moreover, there was no contention that the stock should have been registered with the S.E.C. when it was originally issued. The theory underlying the Government's charge that the sales were unlawful was that Birrell, his corporations and the individuals allied with him were "control" persons, and thus "issuers" within the meaning of the Securities Act of 1933, and that the Res and the others were thus "underwriters", who are prohibited from selling unregistered stock to the public. In other words, while the stock concededly did not require registration originally, its later acquisition by Birrell, or those associated with him, changed its character legally, necessitating registration before there could be a valid public distribution of it.

With respect to Birrell's rigging of the market in Swan-Finch, the Government argued that the Res, as specialists,

occupied a key position with respect to establishing the market price on the Exchange, and consequently were able to control the price in order to serve Birrell's interests rather than to exercise their proper function of maintaining an orderly market.

Intrusion into Attorney-Client Confidences

An important and cooperative witness for the Government was Nahum Birnbaum, a stock broker who was deeply involved in Birrell's activities with respect to Swan-Finch stock. He had helped Birrell gain control over unregistered shares which had been issued to others in exchange for assets; Birnbaum had also put some of those shares through his own account and accounts of his partners and favored customers, while these shares were on their complex route to the public under Birrell's direction (*Appellants' Appendix*, pp. 36a-37a, 40a-43a, 45a-52a, 204a). Birnbaum also aided Birrell in *purchasing* Swan-Finch on the American Stock Exchange; these purchases tended to support the price there at a time when Birrell was shown to be "rigging" the market (*Appellants' Appendix*, pp. 43a-44a, 52a). In addition to this involvement, evidence was adduced which showed Birnbaum was guilty of acts similar to those relied upon by the Government to show that the Res, in the course of their stock dealings with Birrell, possessed a guilty intent. Such evidence included proof that Birnbaum's name was included in Birrell's secret records as the recipient of cash "under-the-table" (*Appellants' Appendix*, pp. 176a-177a; Exh. 519, pp. 56-17, 56-21) and proof of Birnbaum's receipt of "cheap stock" (*Appellants' Appendix*, pp. 42a-43a, 45a-52a). Although Birnbaum had not been named as a defendant or co-conspirator, it was

clear that the question of whether or not to name him had, at the very least, been a close one.

At the trial, it developed that, from the time Birnbaum was called by the United States Attorney to discuss the possibility of his testifying before the Grand Jury until the time of his appearance as a Government witness at the trial, he had been continually represented by an attorney who had also previously represented the Res in allied matters. Thus, he had appeared for them in the disposition of S.E.C. charges which dealt with their activities with respect to Swan-Finch stock.[3] Indeed, he had represented them at the time of their arrest, and in exploratory discussions thereafter with the United States Attorney looking toward a possible disposition (*Appellants' Appendix*, pp. 88a-89a, 90a, 91a-92a, 93a, 94a-95a, 99a-100a, 107a-108a, 114a-115a, 121a). The United States Attorney acknowledged that he knew, all along, of the dual role played by the attorney (*Appellants' Appendix*, pp. 107a, 108a). Yet the Government took no steps to require Z or his firm to sever their connection with Birnbaum, and, in fact, made neither objection to their conduct, nor revelation of it to the defense attorneys.

After a hearing, at which several Assistant United States Attorneys and Z testified, the trial court concluded that the Res' rights had not been prejudiced and that they had not been denied a fair trial (*Appendix A, infra*, p. 25a). On the appeal, the Court of Appeals assumed (1) that the

3. For the purposes of the appeal, the attorney has been referred to as "Z". According to Z, he and his firm had represented Birnbaum prior to his being retained by the Res, but he had advised the Res at that time that he saw no resulting conflict (*Appellants' Appendix*, p. 100a).

Res had given confidential material to Z concerning their activities with respect to Swan-Finch, (2) that where identity of subject matter of a litigation is shown, an irrebuttable inference arises that a lawyer who has represented both parties will have obtained and used confidences of the former client to the detriment of that client in the pending litigation and (3) that that rule would apply in a criminal case to warrant a reversal of a conviction (*Appendix A, infra*, pp. 26a-27a). The court held, however, that the rule did not apply to the facts of this case because Birnbaum was not a party litigant nor a prosecuting witness, and Z's representation of him did not actually extend to his appearance in the Grand Jury proceedings or at the trial (*Appendix A, infra*, pp. 27a-28a). This led to the further conclusion that Z's conduct was not improper, and that the Res had failed to show that Z's relationship with Birnbaum had prejudiced their defense (*Appendix A, infra*, p. 28a).

Vagueness of Anti-Manipulative Provisions Applied to Specialists

A major legal contention of the Res related to their having been charged with conspiring to violate the anti-manipulative provisions of the Securities Exchange Act of 1934 (15 U.S.C. §§ 78i, 78j[b]) despite the fact that they were specialists in Swan-Finch. Those provisions prohibit, in general terms, the manipulation by *anyone*, regardless of his occupation or function in the market, of security prices and the use of manipulative and deceptive devices in trading. This same Act, however, also contains a specific recognition by Congress that the securities exchanges will register certain brokers as specialists, and

that such specialist brokers will have a legitimate function involving a certain amount of artificial or manipulatory effect on the market, in derogation of the untrammeled effect of the normal laws of supply and demand, *i.e.*, the specialist's obligation to maintain "a fair and orderly market" (15 U.S.C. 78[k]). The specialist performs this function by injecting "himself into the market on either the bid or offer side, or both, if in his judgment there is too wide a spread between the public bid and offer" (*Staff Report on Organization, Management, and Regulation of Conduct of Members of the American Stock Exchange.* 1962 S.E.C. Report, p. 22). Literally applied, certain provisions of the anti-manipulation sections (78i[a][2], 78i[a][6], 78j[b]) prohibit the recognized function of the specialist. The result is an inconsistent, vague and confusing statutory scheme which fails to give adequate warning to a specialist of what he can and cannot do. The S.E.C. has failed, moreover, to clarify the statutory scheme by prescribing rules and regulations for transactions by specialists, although required to do so by Section 78k of the Securities Exchange Act, adopted 30 years ago.

The Court of Appeals disposed of this argument by applying two of its decisions to the effect that the challenged provisions were not unconstitutionally vague as they applied to *non-specialists* (*Appendix A, infra*, p. 16a), which it held were controlling because the trial court had left to the jury the issue of whether the Res were performing their function "as specialists", or were "engaging in manipulating the price of the stock in the manner declared unlawful by the statute" (*Appendix A, infra*, pp. 16a-17a).

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals has sanctioned the Government's indirect intrusion into the confidences of a defendant to his lawyer by welcoming the cooperation of a witness who is being advised and counseled by an attorney who became privy to the defendant's secrets in his professional capacity, and has placed the impossible burden upon the defendant of showing prejudice arising from the attorney's relationship with the witness although that relationship and their attorney-client communications are privileged.

The issues raised by Z's representation of a Government witness in a prosecution against Z's former clients involve not only public confidence in a system in which one has no choice but to rely upon his attorney, but also intrusion by the Government into the confidences of an attorney and his client in violation of a defendant's constitutional rights to a fair trial, to counsel, and against self-incrimination.

> *Glasser* v. *United States* (1941), 315 U.S. 60;
> *Coplon* v. *United States* (Ct. App. D.C. 1951), 191 F. 2d 749, cert. den. 342 U.S. 926;
> *Caldwell* v. *United States* (Ct. App. D.C. 1953), 205 F. 2d 879, cert. den. 349 U.S. 930;
> *Matter of Fusco* v. *Moses* (1952), 304 N. Y. 424, 107 N.E. 2d 581;
> *State* v. *Cory* (1963), 62 Wash. 2d 371, 382 P. 2d 1019.

The Res, having the undoubted right, and, indeed, being under the compelling necessity, to rely upon their attorney, revealed confidences to Z in defending themselves against charges of impropriety with respect to their dealing in

Swan-Finch stock. Z later appeared as attorney for Birnbaum, who had been called into conference by the Government in a proceeding directed against the Res, and for whom, upon the objective facts, the best course appeared to be zealous cooperation with the Government in order to avoid his own indictment. In the course of conferring with and advising Birnbaum (who in turn was conferring with and trying to impress the Government), Z, perhaps unwittingly, was a potential conduit of the confidential utterances of his former clients to the ears of the witness and the prosecutor.

This situation is but a slight variation of one which frequently arises in the administration of criminal justice and which should be supervised by this Court. A single attorney, at the time of the arrest or in the early stages of a prosecution, is retained by and obtains the confidences of two persons charged with being confederates. At some point a conflict of interest develops: for A, the better course is to plead guilty, cooperate fully with the Government and hope for some benefit from his cooperation at the time of sentence; for B, who maintains his innocence, the only course is to go to trial. At that point, may the attorney choose to continue to represent A? Can he fulfill his obligation of counseling A in his relations with the prosecutor, in a manner designed to receive the latter's favorable recommendation at the time of sentence, without destroying the concept that B, also, had the right to confer fully and freely with his attorney, secure in the knowledge that no confidences would be used against him? If the Government knows of this conflict, must it take any steps to protect the defendant?

The Court of Appeals did not directly answer these questions but ruled instead that, before any remedy is available to the former client, he must show actual prejudice from his former attorney's continued representation of the Government witness. Such a task, however, is impossible without harming the principles sought to be protected. What Z said when he conferred with Birnbaum with respect to his being a witness against the Res (*Appellants' Appendix*, pp. 94a-95a) cannot be effectively explored without destroying the privilege attached to Birnbaum's conversations with *his* attorney. Moreover, the Res' confidences might have been violated in ways which could not practically be revealed, such as the way they may have operated on Z's judgment, and the advice he gave to Birnbaum. Accordingly, there is an irrebuttable presumption that a conflict detrimental to the former client exists.

See:

Consolidated Theatres, Inc. v. *Warner Bros. Circuit Management Corp.* (2d Cir. 1954), 216 F. 2d 920, 926;

Fleischer v. *A.A.P., Inc.* (D.C. So. D.N.Y. 1958), 163 F. Supp. 548, 552-553, app. dism. 264 F. 2d 515, cert. den. 359 U.S. 1002;

T.C. & Theatre Corp. v. *Warner Bros.* (D.C. So. D.N.Y. 1953), 113 F. Supp. 265, 268-269.

See, also:

Marco v. *Dulles* (D.C. So. D.N.Y. 1959), 169 F. Supp. 622, 629-630, app. dism. 268 F. 2d 192;

Bassett Co. v. *Cook Co.* (D.C.D. Conn. 1961, 1962), 201 F. Supp. 821, aff'd 302 F. 2d 268;

Brown v. *Miller* (Ct. App. D.C. 1923), 286 F. 994.

By distinguishing the above civil cases on the procedural ground that, in the criminal case at bar, Birnbaum was not a party or even a prosecuting witness and Z was not an attorney for the Government, the Court of Appeals has ignored the substantive realities of the situation, and, in effect, sanctioned the revelation or use by an attorney of a former client's confidences for the benefit of a subsequent client. What is worse, we submit (since the court could well exercise control over it), if sanctioned the Government's knowing acceptance of the benefits of such an intrusion into a defendant's confidences to his lawyer.

2. The Court of Appeals' decision that a vague and inconsistent statutory scheme can be remedied by leaving to the jury the question of whether the defendants' conduct was legitimate or in violation of the statute is contrary to the prior decisions of this Court and is a violation of due process.

As noted in the Statement of the Case, the statutes under which the Res were convicted place an explicit ban, in terms, upon the exercise of their function as specialists; elsewhere, however, that function is, confusingly enough, acknowledged to be lawful. One example is Section 78i (a)(2), which makes it *unlawful*

> "to effect . . . a series of transactions in any security . . . creating actual or apparent active trading in such security or depressing the price of such security, for the purpose of inducing the purchase or sale of such security by others."

As the S.E.C.'s 1962 "American Stock Exchange Report" recognizes, however, a specialist is *required* to inject himself into the market if it is his judgment that there is too

wide a spread between the public bid and offer. Narrowing the gap between a bid and offer has the obvious purpose of inducing potential buyers and sellers to engage in transactions. Thus, in the course of doing their duty as specialists, sanctioned by Section 78k of the 1934 Act, the Res would necessarily be effecting the series of transactions condemned by another part of the Act, Section 78i (a)(2), and would necessarily have the prohibited intent.

This Court has repeatedly held that where a statutory scheme fails to reveal clearly the legislative intent behind it, and contains conflicting, inconsistent or inadequately defined standards of conduct, such a statute cannot constitutionally serve as the basis for a conviction. *United States* v. *Cardiff* (1952), 344 U.S. 174; *Lanzetta* v. *New Jersey* (1939), 306 U.S. 451; see, also, *Cline* v. *Frink Dairy Co.* (1927), 274 U.S. 445; *United States* v. *L. Cohen Grocery Co.* (1921), 255 U.S. 81.

The Court of Appeals disposed of this problem rather summarily by referring to a portion of the trial court's charge to the jury concerning the applicability of Section 78i (a) (2) (*Appendix A, infra,* pp. 16a-17a; see also, *Appellants' Appendix,* pp. 230a-231a). That portion of the charge left it to the *jury* to determine whether the statute applied to the Res, as follows:

> "So in determining the application of this section to them you must determine whether the evidence shows that Re, Senior, and Re, Junior, were maintaining an orderly market in Swan-Finch, as they were required to do as specialists, or whether the government has proved beyond a reasonable doubt that they were knowingly and wilfully engaging in manipulating the price of the stock in the manner declared unlawful by the statute."

On the basis of this charge, the Court of Appeals found in the jury's guilty verdict a determination that the Res had not been performing the legitimate function of specialists, and, therefore, held that the Res were not in a position to claim that the statutory scheme was unconstitutionally vague when applied to them as specialists (*Appendix A, infra*, p. 17a).

That decison, we submit, flies in the face of the constitutional rule requiring definiteness in penal legislation and conflicts with the principles underlying this Court's decisions cited above. There can be absolutely no doubt that the Res were functioning as specialists in Swan-Finch every day the Exchange was open throughout the entire period of the alleged conspiracy (see *Appendix A, infra*, pp. 4a, 5a, 7a). The Government did not contend that the Res, during that period, *never* performed their legitimate function as specialists in Swan-Finch; there simply was no such issue in the case. Indeed, even the Court of Appeals' own summary of the evidence as to manipulation fails to show that the Res *never* functioned as specialists, and points to only two alleged instances of manipulatory activity in the course of three years (*Appendix A, infra*, pp. 5a-6a).[4]

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4. One of those instances of alleged manipulation, as argued by the Government, was that, *because* of their position as specialists, the Res caused the rise in the price of Swan-Finch soon after Birrell assumed control. It is odd that this particularly weak argument of the Government should have been picked up by the Court of Appeals for use in its opinion. There had been no proof as to how the Res had supposedly accomplished this feat. Moreover, the advent of new management to control of an old but moribund company is of itself frequently sufficient to cause speculation and rising prices in a hitherto dormant security. The Government's own evidence showed that Birrell, at the time a well-known and energetic financier, had hired a public relations firm, had called a meeting of stock analysts in order to tout the potentialities of the company under its new executives and had acquired new assets for the company.

Thus, when they were told that it was up to them to decide whether the Res had been manipulating the price "in the manner declared unlawful by the statute," or whether the Res had been acting legitimately, as specialists, the jury was able to find the Res guilty upon their conduct in performance of their specialists' function, banned, in literal terms, by the statute. The "manner declared unlawful by the statute" was the manner sanctioned by Section 78k. Instead of curing the vagueness of that statute, the portion of the charge relied upon by the Court of Appeals thus illustrates the vice of a vague and inconsistent statutory scheme.

Even if the jury's decision had been based upon conduct which could be considered to be clearly within the intent of the statutory scheme (a fact which we have no way of knowing), the "vice of vagueness" destroys absolutely the applicability of the statute as a basis for a criminal conviction. *Lanzetta* v. *New Jersey, supra; Cline* v. *Frink Dairy Co., supra; United States* v. *L. Cohen Grocery Co., supra.* The applicable principle was stated by this Court in the *Lanzetta* case, as follows (306 U.S., at p. 453):

> "If on its face the challenged provision is repugnant to the due process clause, specification of details of the offense intended to be charged would not serve to validate it. . . . It is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression . . ."

See also, *United States* v. *Harriss* (1953), 347 U.S. 612, 629.

An exception to this rule appears to exist where an otherwise vague statute requires *a specific criminal and preda-*

tory intent. It has been held that the addition of such a specific element of the offense to the definition of the crime furnishes sufficient definition to enable the court to look at the alleged criminal conduct of the defendant. See, *e.g.*, *United States* v. *National Dairy Products Corp.* (1963), 372 U.S. 29, 35.

In the case at bar, however, there was no element of a specific evil or anti-social intent. The specific purpose required was merely that of inducing the purchase or sale of stock.

Accordingly, the Court of Appeals' decision which sanctions solving the problem of vagueness by letting the jury decide whether the statute applies to the defendant, should not be allowed to stand.

3. The petitioner adopts the questions presented and every reason for granting certiorari submitted by his co-defendants insofar as they may be applicable to his case.

CONCLUSION

For the foregoing reasons, it is respectfully urged that the petition for certiorari should be granted.

Respectfully submitted,

HARRIS B. STEINBERG
Counsel for Petitioner

HARRIS B. STEINBERG
RICHARD A. GREEN
STANLEY S. ARKIN
Of Counsel

August, 1964.

APPENDIX A

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 317—September Term, 1963.

(Argued March 2, 1964 Decided July 24, 1964.)

Docket No. 28526

UNITED STATES OF AMERICA,

Appellee,

—v.—

GERARDO A. RE, a/k/a JERRY A. RE, GERARD F. RE, CHARLES A. CASAGRANDE, a/k/a CHARLES A. GRANDE and ELY BATKIN,

Defendants-Appellants.

Before:

WATERMAN, MOORE and FRIENDLY,

Circuit Judges.

Four defendants appeal from judgments of conviction entered after a jury verdict in the United States District Court for the Southern District of New York, Dudley B. Bonsal, *Judge*. Each appellant was found guilty on count one, which charged a conspiracy to violate the Securities Act of 1933, 15 U. S. C. A. §§77e(a), 77e(c), 77q(a), 77x, the Securities Exchange Act of 1934, 15 U. S. C. A. §§78i, 78j(b), 78ff(a) and 17 C. F. R. §240.10b-5. Convictions were also entered on count two (Gerardo A. Re, Gerard F. Re and Charles A. Casagrande) and count three (Ely Batkin) both of which charged a violation of 15 U. S. C. A. §§77e(a)(1) and 77x and 18 U. S. C. A. §2.

The conviction of Batkin on count three is reversed with directions to dismiss that count of the indictment as to him. The convictions of appellants on counts one and two are affirmed.

SOMMERFIELD & JAMES (Irving A. James, Arthur M. Sommerfield, Jacob Grumet, of counsel), New York, N. Y., *for appellant Ely Batkin.*

MICHAEL P. DIRENZO, New York, N. Y., *for appellant Charles A. Casagrande.*

HARRIS B. STEINBERG (Stanley S. Arkin, of counsel), New York, N. Y., *for appellant Gerardo A. Re.*

RICHARD A. GREEN, New York, N. Y., *for appellant Gerard Re.*

PETER H. MORRISON, Assistant United States Attorney (Robert M. Morgenthau, United States Attorney for the Southern District of New York, John S. Martin, Jr. and David M. Dorsen, Assistant United States Attorneys, of counsel), *for the United States of America.*

MOORE, *Circuit Judge*:

Gerardo A. Re, also known as Jerry A. Re (hereinafter Re, Sr.), his son Gerard F. Re (hereinafter Re, Jr.), Charles A. Casagrande, also known as Charles A. Grande (hereinafter Grande) and Ely Batkin appeal from judgments of conviction entered after a jury trial in the United States District Court for the Southern District of New York.

The case went to the jury after a ten-week trial on three counts of the original eight count indictment.[1] Count one charged appellants Re, Sr., Re, Jr., Grande and Batkin and defendants Lowell M. Birrell, Jacob Yaffe and Verna Skoglund with conspiracy to violate specified sections of the Securities Act of 1933 and the Securities Exchange Act of 1934[2] by using facilities of interstate commerce to sell unregistered stock of Swan-Finch Oil Corporation, to employ fraudulent methods in such sales, and to create the false appearance of an active Swan-Finch market on the American Stock Exchange. Count two charged that Re, Sr., Re, Jr., Birrell and Grande unlawfully made use of the facilities of the American Stock Exchange to sell 8,900 unregistered shares of Swan-Finch in violation of 15 U. S. C. A. §77e(a)(1), 77x and 18 U. S. C. A. §2. Count three charged that Batkin and Yaffe violated the same statutes in causing the mails to be used in the sale of 200 unregistered shares of Swan-Finch. The case against defendant Birrell, then a fugitive, was severed, and a judgment of acquittal was directed as to Verna Skoglund at the end of the Government's case. The jury found the remaining defendants guilty on each of the counts in which they were named. Yaffe, who was given a one year suspended sentence, has not appealed. Grande appeals only from his conviction on count two.

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[1] Counts four through seven charged separate violations of 18 U. S. C. A. §1001 on the part of Re, Sr., Re, Jr., and Grande in the course of a matter within the jurisdiction of the Securities and Exchange Commission while count eight charged they they conspired to violate that section. On a motion for severance, the district court held that the joinder was not defective under Rule 8(a) or (b) of the Federal Rules of Criminal Procedure. Nevertheless, to safeguard the interests of defendants Skoglund, Yaffe and appellant Batkin, he ordered a severance of these counts.

[2] 15 U. S. C. A. §§77e(a), 77e(c), 77q(a), 77x, 78i, 78j(b), 78ff(a) and Rule 10b-5 of the S. E. C., 17 C. F. R. §240. 10b-5.

THE EVIDENCE

Since the sufficiency of the evidence on the conspiracy count is conceded, it will suffice to sketch in broad outline the activities in which the jury could have found appellants to have been engaged. The Government's case centered on the stock market enterprises of defendant Birrell, who from 1954 until 1957 had engineered the sale of more than 800,000 unregistered shares of Swan-Finch stock while simultaneously manipulating its price on the American Stock Exchange. The Government sought to prove that Re, Sr. and Re, Jr., who functioned as "specialists"[3] in Swan-Finch and other stocks on the American Exchange, were instrumental in the market manipulation of Swan-Finch stock and distributed the major portion of Birrell's Swan-Finch stock by way of a network of twenty-one brokerage accounts. Grande was a longtime friend of the Res, and accounts in his name were among those used by them in the distribution. Batkin was the undisclosed principal in Sinclair Securities, an over-the-counter brokerage firm also deeply involved in the Swan-Finch distribution.

In so far as the conspiracy and substantive counts charged the unlawful sale of unregistered securities, 15 U. S. C. A. §§77e(a)(1), 77x, 18 U. S. C. A. §2, the Government proceeded on the theory that appellants knowingly participated in the sale of "control" stock which emanated from Birrell. Briefly, the Securities Act of 1933 proscribes the sale of unregistered stock by an "underwriter," *i.e.*, one

[3] For a thorough description and discussion of the role of the market "specialist," see generally Leflar, *The Stockmarket* 216 (2d ed. 1957); 2 Loss, *Securities Regulations* 1201-09 (2d ed. 1961).

who provides an outlet for the stock of an "issuer." See *United States* v. *Dardi*, 330 F. 2d 316, 325 (2d Cir. 1964); *United States* v. *Crosby*, 294 F. 2d 928, 939-40 (2d Cir. 1961), *cert. denied sub nom. Mittleman* v. *United States*, 368 U. S. 984 (1962). The relationship between Birrell (the "issuer") and appellants (the "underwriters"), therefore, was basic to the Government's proof.

Market Manipulation

Birrell acquired control of Swan-Finch[4] in May, 1954 and immediately committed 10,000 Swan-Finch shares to Re, Sr. and Grande by way of a three-month call. Within two months he had arranged to have the Res appointed specialists. Although it had been long dormant, Swan-Finch stock soon began a rather spectacular market rise. The Government's explanation of this sudden and uncalled for enthusiasm was that as specialists the Res knew exactly how much stock to buy or sell in order to raise or lower the market. With the Res' help, Birrell could control the price at will. There was also evidence that this manipulation extended to other stocks whose market performance was closely tied with that of Swan-Finch.

In June and July, 1955, Sidney Barkley and Charles Rosenthal, undisclosed principals in the over-the-counter brokerage firm of I. F. Stillman & Co., agreed with Birrell to enter the market rigging operation. The Stillman firm, which engaged in so-called "boiler-room" sales tactics, was to support the Swan-Finch market on the Exchange with

[4] Swan-Finch manufactured lubricating oils and greases. It enjoyed unlisted trading privileges on the American Exchange.

buy orders and later to sell the stock thus acquired over-the-counter. For this service, Birrell made "under-the-table" cash payments. Since the Stillman sales campaign depended largely on the closing price, Re, Sr. agreed to advise Barkley and Rosenthal of any increased selling so that Stillman could absorb the supply. Re, Sr. was also to tell Barkley and Rosenthal what was "on the book" so that they would know exactly how much to purchase to raise the price on any particular day.[5] If Stillman & Co. was unable to meet the sell orders, it was understood that Re, Sr. would make the purchase required to maintain the desired market level. On at least one occasion, Re, Sr., Barkley and Birrell met to review the Swan-Finch rigging operation. Barkley testified that Re, Sr., annoyed by Birrell's failure to deliver some stock, exclaimed that he did not care what happened to Birrell's market. Barkley interjected that he could not afford a market drop since his customers would refuse to pay if the market fell. Birrell was able to reassure Re, Sr. that the stock would be forthcoming and Re, Sr. seemed appeased. On one other occasion, Birrell told Re, Sr. to buy a large block of stock rather than let Swan-Finch suffer a drop in price.

The Distribution

While the market rigging continued with full vigor, the Res, Grande and Batkin were engaged in distributing Birrell's Swan-Finch stock. When Birrell acquired control in 1954, there were 34,794 shares of common stock outstand-

[5] The specialist is prohibited from disclosing the information on his "book" to anyone other than an official of the Exchange or a representative of the S. E. C. by 15 U. S. C. A. §78k(b).

ing. However, through a series of issuances and a three-for-one stock split, there were in excess of 2.8 million shares outstanding by January 15, 1957. Appellants participated in the distribution of approximately 800,000 of the more than 1 million shares which came to be controlled by Birrell. None of this Swan-Finch stock was registered with the Securities and Exchange Commission (S. E. C.).

The Res' distribution of over 600,000 shares of Birrell's Swan-Finch on the American Exchange was accomplished by means of twenty-one stock accounts maintained at three brokerage houses. Nineteen of these accounts, according to the Government, were opened, controlled and managed exclusively by the Res and they controlled the Swan-Finch activity in two others. Accounts opened in Grande's name were the vehicles by which a total of 498,500 shares were distributed; other accounts, maintained in the names of relatives and friends of the Res and Birrell or controlled by Birrell, were employed for the sale of an additional 117,700 shares. Accounts maintained by the Res began to sell Birrell's stock the day they became specialists in Swan-Finch. Generally, they would sell shares from an account of their choice and then, to cover the sale, cause stock to be delivered to that account from a Birrell-controlled source at a price below the market. There was evidence that the floor partner for Josephthal & Co., where the substantial Grande accounts were maintained, gave the Res orders on a "not held" basis which permitted them to exercise discretion in their execution.[6]

The Res' distribution on the Exchange was augmented by the over-the-counter sales of three firms: I. F. Stillman

[6] This is specifically prohibited by 15 U. S. C. A. §78k(b).

& Co., L. S. Mack & Co., and Sinclair Securities Corporation. Barkley and Rosenthal (I. F. Stillman & Co.) successfully "boiler-roomed" approximately 70,000 Swan-Finch shares which they had acquired on the Exchange in cooperation with the Res and Birrell. Birrell supplied stock to L. S. Mack & Co. at $5.00 per share and also gave Lloyd Mack, the firm's principal, an under-the-table cash payment based on the price at which Mack was able to sell to the public. Birrell chose the "S & C Trading Co., Inc." to camouflage his transactions with Mack, which eventually accounted for the sale of 21,925 shares.

The most effective participant in the over-the-counter distribution was Sinclair Securities. While ostensibly owned and managed by defendant Yaffe, the Government's proof readily allowed the inference that appellant Batkin was an undisclosed owner and that he actively engaged in Sinclair's sales of Swan-Finch. Although most of the 197,608 shares sold by Sinclair were obtained from Birrell, the books of Sinclair indicated fictitious sources. Batkin and Yaffe, along with the Res and the other participants in the distribution, received surreptitious cash payments from Birrell.

On this appeal, appellants urge that their convictions must be reversed on a variety of grounds. They attack the relevant provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934 as vague and indefinite, and argue as well that the floor of the American Stock Exchange is not a means of communication in interstate commerce. Errors arising from the conduct of the trial are said to include the admission of hearsay business records and

the Government's knowing use of the testimony of a witness who was then the client of an attorney who had earlier represented the Res. Re, Jr. and Grande challenge their convictions on count two on the ground that the Government failed to prove that they had anything to do with the sale alleged. In a similar vein, Batkin contends that there was no proof that the 200 shares described in count three were in fact "control" shares; in addition he argues that he was denied a fair trial due to the admission of inculpatory testimony of the Res and Grande before the S. E. C.

THE "DERISI" RECORDS

Evidence of cash payments in substantial amounts was an important element in the Government's proof that appellants Re, Sr., Re, Jr., Batkin and other defendants were intimately allied with Birrell in the unlawful distribution and market manipulation. Although there was much additional proof to the same effect, the so-called "DeRisi" records were an important factor in establishing Birrell's payments to the alleged co-conspirators. Appellants claim that these records constituted hearsay and that their introduction into evidence was reversible error.

Joseph DeRisi was employed by Birrell as his bookkeeper from 1952 until 1958. At all times he took his orders directly from Birrell and worked without other supervision. He was chiefly concerned with keeping the books related to various corporations and personal bank accounts, all of which were controlled by Birrell. At trial, the Government's proof focused on the cash disbursement books of four of these accounts, those entitled "Birrell & Larson,"

"Harry Workman," "Ernest Espinosa" and "A. Hector Rivero." In connection with the many checks drawn on these accounts payable only to "cash," DeRisi's records showed notations which purported to identify the recipients. When totalled it was revealed that $239,180 had been paid to the Res while $246,800 was distributed to "Sinclair," "Yaffe" and "Bob," who, the jury was entitled to infer, was actually appellant Batkin.

The information which eventually found its way into the records kept by DeRisi came from the checkbook stubs of each account. Carter Whitney, Birrell's messenger and man "Friday," defendant Verna Skoglund, Birrell's secretary, DeRisi and perhaps Mrs. Skoglund's replacement, Miss Miller, always at Birrell's direction, wrote the checks. Birrell identified the recipient either when the check was drawn or when the cash was delivered. The practice was to note initials or some other abbreviation to identify on the stub the recipient of a check made payable to cash. The checkbooks were stored in a file cabinet in Whitney's office in Birrell's executive suite at Doeskin Products; the cabinet was kept locked and only Birrell, DeRisi, Mrs. Skoglund and Whitney had keys. In general, matters concerning the various accounts with which DeRisi was concerned were treated confidentially by Birrell and his office employees.

About two or three times a month, DeRisi examined these stubs and entered the amounts of the checks cashed along with the recipient there designated in the appropriate cash disbursement book "so that the bank statement could be reconciled with the cash book." DeRisi testified that he did so "in the regular course of business." On some occasions,

however, the check stub was incomplete, and DeRisi had to ask Whitney, Mrs. Skoglund or, "very rarely," Birrell himself, who the recipient had been. DeRisi would then complete the stub and make the appropriate cash book entry. He did not enter a recipient in the cash disbursement book when stub information was insufficient and no explanation was given by Whitney, Mrs. Skoglund or Birrell.

The Business Records Act, 18 U. S. C. A. §1732 provides in relevant part:

> "Record made in regular course of business; photographic copies.
>
> (a) In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.
>
> *All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.*
>
> The term 'business,' as used in this section, includes business, profession, occupation, and calling of every kind." (Emphasis added.)

As appellants concede, the DeRisi records have all the superficial trappings of business regularity that customarily

vouchsafe the absence of any motive to misrepresent. The records were kept on familiar ledger forms, were scrupulously regular, were made within a reasonable time after the transaction, and were prepared for a seemingly natural purpose under the specific orders of the employer. DeRisi described them as a "set of books" consisting of "a cash receipts book, a cash disbursements book, a general ledger and a general journal." Nevertheless, appellants urge on various ground that DeRisi's records amounted only to a diary of Birrell's personal affairs and that they lacked the traditional earmarks of trustworthiness contemplated by the statute.

There is no merit in the claim that because most of the information recorded by DeRisi reflected the affairs of one person—Birrell—that the records were merely "personal" and as such not within the purview of the Business Records Act. The statute makes no such qualification. "Business," is broadly defined so as to include "business, profession, occupation and calling of every kind." That Birrell, while distributing a huge block of control stock to the investing public through a complex system of brokerage accounts and over-the-counter sales, was engaged in a "business" or an "occupation" seems so obvious that discussion is scarcely necessary. And, the Government's proof makes it equally clear that the accounts which DeRisi's books reflected were directly involved in the distribution. For example, accounts in the names of Hector Rivero and Ernest Espinosa were used at Josephthal & Co. as vehicles for distribution and as sources of stock at Sinclair. An account in the name of Birrell & Larson was maintained at Birnbaum & Co. The

Harry Workman account appears as the source of Swan-Finch stock delivered to the Grande accounts at Josephthal & Co. and Ira Haupt & Co.

The fact that Birrell's business of distributing unregistered shares of Swan-Finch was unlawful does not affect the admissibility of his records as kept by DeRisi. "The Act does not discriminate between lawful and unlawful businesses." *United States* v. *Quick*, 128 F. 2d 832, 837 (3d Cir. 1942); see *United States* v. *Quong*, 303 F. 2d 499 (6th Cir.), *cert. denied*, 371 U. S. 863 (1962); *Arena* v. *United States*, 226 F. 2d 227 (9th Cir. 1955), *cert. denied*, 350 U. S. 954 (1956); *Spear* v. *United States*, 216 F. 2d 185 (4th Cir. 1954); *Fischer* v. *United States*, 212 F. 2d 441 (10th Cir. 1954). Moreover, courts have consistently given full effect to the statute's sweeping declaration that the "circumstances of the making" have a bearing only on the weight to be given the writing and not on its admissibility. Thus, irregularities similar to those found here, such as the informality of the abbreviations, see *Arena* v. *United States*, *supra*; *United States* v. *Alaimo*, 191 F. Supp. 625, 628 n. 7 (M. D. Pa.), *aff'd*, 297 F. 2d 604 (3d Cir. 1961), *cert. denied*, 369 U. S. 817 (1962), possible inconsistencies, see *LaPorte* v. *United States*, 300 F. 2d 878 (9th Cir. 1962), inaccuracies, see *United States* v. *Bernard*, 287 F. 2d 715 (7th Cir.), *cert. denied*, 366 U. S. 961 (1961), or incompleteness, see *United States* v. *Kimmel*, 274 F. 2d 54 (2d Cir. 1960) have not precluded admissibility, but have been factors for the jury to evaluate in considering the writing along with the other evidence. See also *Bodnar* v. *United States*, 248 F. 2d 481 (6th Cir. 1957). The fact that the records were not maintained in the most businesslike or efficient way is likewise imma-

terial on the threshold issue of admissibility. Furthermore, the statute itself expressly disposes of any difficulty presented by the fact that DeRisi in most instances lacked "personal knowledge" of the fact recorded by each entry. In sum, the minimum requirements of admissibility were clearly satisfied. See *United States* v. *New York Foreign Trade Zone Operators, Inc.*, 304 F. 2d 792, 796 (2d Cir. 1962).

Here there was an additional guarantee of reliability in that DeRisi did not gather his information from random sources but from fellow employees who also were acting in the regular course of business in making notations on the stubs in the first instance and in passing the data to DeRisi orally later on if they had neglected to mark the checkbook properly. See *United States* v. *Grayson*, 166 F. 2d 863, 869 (2d Cir. 1948). See generally Note, *Revised Business Entry Statutes*, 48 Colum. L. Rev. 920, 924-27 (1948).

It is, of course, true that records kept in the course of Birrell's enterprise do not fall into the category of the usual set of books found in the offices of legitimate commercial or industrial enterprises. Birrell's "business," "occupation" or "calling," however, was not of the usual orthodox nature. The very fact that the illegal distribution of 800,000 shares of unregistered stock by persons who had to be encouraged by cash payments to aid in achieving such a distribution by means of various accounts might well have called for an unusual set of books kept in an unusual manner. The proof is convincing that Birrell relied upon DeRisi as the keeper of his books, that DeRisi employed such means as were available within the Birrell business family

to record the entries on a regular basis and that DeRisi pursued his bookkeeping on a regular basis whether the books were physically located in the Doeskin office, at a Pennsylvania farm or in his own basement office (created at Birrell's suggestion).

To effect his stock transactions Birrell apparently thought it necessary to keep some records. The theory of section 1732 is to avoid the necessity of producing the person who actually participated in the transaction and then tracing through witnesses every step from payment to book entry. The Birrell books through DeRisi were subjected to *voir dire* and cross examination. The jury was made aware of the strength and weakness of the entries. There was no error in admitting the books in evidence.

The Government argues also that the records were admissible as acts or declarations by a conspirator in furtherance of the conspiracy. To support this thesis it points to the necessity in such a complicated operation of maintaining some kind of record of the various accounts and of the distribution of the profits. Appellants, in turn, contend that it must be established that the records were made to further some object of the conspiracy before they are admissible and that these records do not fall into such a category. It is unnecessary to resolve this question in view of our opinion that the records were admissible under section 1732.

The Anti-Manipulative Provision of the Securities Exchange Act of 1934 as Applied to Specialists

The first count of the indictment charged both Res with conspiring with Birrell and the other defendants to manipu-

late the market price in Swan-Finch in violation of the Securities Exchange Act of 1934, 15 U. S. C. §78i, 78j(b), 78ff(a) and Rule 10b-5 of the S. E. C., 17 C. F. R. §240.10b-5. Reduced to the essentials, appellants' argument is that the proscriptions of sections 78i(a)(2) and 78j(b) are irreconcilably inconsistent with the legitimate duty *of a specialist* under sections 78k(a) and (b)(2) to "maintain a fair and orderly market." They argue that "the result is an inconsistent, vague and confusing statutory scheme which fails to give adequate warning to a specialist of what he can and cannot do." There is no suggestion, however, that sections 78i(a)(2) and 78j(b) are unconstitutionally vague as applied to non-specialists, a theory previously rejected in this circuit. See *United States* v. *Minuse*, 142 F. 2d 388 (2d Cir.), *cert. denied*, 323 U. S. 716 (1944); *Wright* v. *S. E. C.*, 112 F. 2d 89, 94 (2d Cir. 1940).

Basic to appellants' defense was the claim that they acted in the legitimate role of specialists, not as market manipulators. This issue was fairly submitted to the jury by the trial court in his charge, which placed before them the question of whether the Res were acting as legitimate specialists. The court charged:

> "Two of the defendants—Re, Senior, and Re, Junior —were specialists in Swan-Finch on the American Stock Exchange, and their counsel has contended that a specialist is charged with the duty of maintaining an orderly market. So in determining the application of this section to them you must determine whether the evidence shows that Re, Senior, and Re, Junior, were maintaining an orderly market in Swan-Finch, as they were required to do as spe-

> cialists, or whether the government has proved beyond a reasonable doubt that they were knowingly and wilfully engaging in manipulating the price of the stock in the manner declared unlawful by the statute."

Inherent in the jury's verdict of guilt on the first count, therefore, was the determination that the Res were not performing the function of specialists in their dealings with Birrell in Swan-Finch. As the Court said in *United States* v. *Wurzbach*, 280 U. S. 396, 399 (1930), "the objection to uncertainty concerning the person embraced need not bother us now. . . . [I]t will be time enough to consider it when raised by someone whom it concerns." To the same effect see *United States* v. *Raines*, 362 U. S. 17, 21 (1960); *Dennis* v. *United States*, 341 U. S. 494, 516 (1951).

THE STOCK EXCHANGE AS A MEANS OF COMMUNICATION IN INTERSTATE COMMERCE

A question squarely posed by the Res' challenge to their conviction on count two is whether the floor of the American Stock Exchange is a means of communication in interstate commerce within the purview of 15 U. S. C. A. §77e(a)(1). That section provides, in relevant part, that "it shall be unlawful for any person . . . (1) to make use of any means or instruments of . . . communication in interstate commerce or of the mails to sell [an unregistered] security." In the transaction depicted in count two, Re, Sr. initiated from the floor of the Exchange a sale of 8,900 shares of Swan-Finch emanating from another broker and the account of appellant Grande. There was no allegation in the indictment of a use of the mails or telephone facilities

in connection with the sale. Appellants contend that because several sections of the Securities Exchange Act of 1934, 15 U. S. C. A. §78i(a), 78j and 78k, specify "any facility of any national securities exchange," Congress could not have intended the phrase "means . . . of communication in interstate commerce" in the Securities Act of 1933 to include the floor of the American Exchange. Furthermore, while conceding that the Exchange floor may be considered as "contributing meaningfully to the stream of interstate commerce," appellants urge that the ordinary meaning and common usage of the language of the 1933 Act in itself prohibits a construction which would encompass the floor of a stock exchange. We cannot agree, and consequently hold that section 77e(a)(1) includes as a "means . . . of communication in interstate commerce" the floor of the American Stock Exchange.

Appellant's first theory that the specific inclusion of "any facility of any national securities exchange" in the 1934 Act necessarily meant that Congress had intentionally excluded such a facility from more general language in the earlier Act, is not persuasive. See *United States* v. *Price*, 361 U. S. 304, 313 (1960); *Fogarty* v. *United States*, 340 U. S. 8, 13-14 (1950); *United States* v. *United Mine Workers*, 330 U.S. 258, 282 (1947). A somewhat similar problem was recently presented in *United States* v. *Roth, et al*, —— F. 2d —— (2d Cir. 1964), where two employers were convicted after arranging a loan in violation of 29 U. S. C. A. §186(a), prior to its amendment. The original enactment prohibited an employer from paying or delivering "any money or other thing of value" to a representative of his

employees. As amended, the section specifically included loans within the general prohibition. In holding that Congress' subsequent particularity did not detract from the unambiguous general provision of the original, we noted that the coverage of the earlier statute must be ascertained from its own terms. Such an approach is particularly appropriate here where two fundamentally different, if complementary, regulatory schemes are involved.

We likewise find no merit in appellants' alternative theory, that common usage and the plain meaning of the statutory terms preclude a holding that the floor of the Exchange is a means of communication in interstate commerce. We have found no federal court opinion precisely on point and have been cited to none. However, the S. E. C. has considered the question and has consistently held that a national stock exchange is a means of communication in interstate commerce within the Securities Act of 1933. The reasoning supporting this position was well-stated in *Brooklyn Manhattan Transit Corp.*, 1 S. E. C. 147, 173 (1935).

> "It would appear that a stock exchange . . . which has become registered as a national securities exchange under the Securities Exchange Act of 1934 may, because of the intimate and unbroken relationship of transactions on such exchange to the interstate 'flow' of securities through such an exchange [citing cases], in itself be regarded as a means of or instrument of communication or transportation in interstate commerce . . ."

See *Cady, Roberts & Co.*, S. E. C. Securities Exchange Act Release No. 6668, CCH Fed. Sec. L. Rep. ¶76,803 (1961);

Consolidated Development Corp., S. E. C. Securities Act Release No. 4287, CCH Fed. Sec. L. Rep. ¶76,723 (1960); 3 Loss, *Securities Regulations*, 1520-21 n. 4 (2d ed. 1961).

We think that the construction adopted by the S. E. C. is in harmony with the plain meaning of the statute. See *S. E. C.* v. *Associated Gas & Electric Co.*, 99 F. 2d 795, 798 (2d Cir. 1938). Indeed, even without such guidance, we would be quite reluctant to hold that transactions on the floors of the various national exchanges, the market places and nerve centers of national financial activity, were not encompassed within the broad language of the 1933 Securities Act. In *Schiller* v. *H. Vaughan Clarke & Co.*, 134 F. 2d 875, 878 (2d Cir. 1943), this court commented: "In declaring unlawful the transactions described in section 5 Congress meant to exert its power to the full constitutional extent permitted by the commerce clause and the postal clause."

THE "CONTROL" CONCEPT UNDER THE SECURITIES ACT

Appellant Batkin advances the theory that the concept of "control" stock is unconstitutionally vague and indefinite since "control" is nowhere defined in the statute and that the trial court's instructions on this point were defective. Neither contention is well taken. The meaning of "control" under the act is no different than it is in normal everyday usage. "The requirement of reasonable certainty does not preclude the use of ordinary terms to express ideas which find adequate interpretation in common usage and understanding." *Sprolés* v. *Binford*, 286 U. S. 374, 393 (1932); *cf. United States* v. *Guerrero*, 281 F. 2d 742, 746-47 (2d

Cir.), *cert. denied*, 364 U. S. 871 (1960); *United States* v. *Minuse*, *supra*. The instructions to the jury in this connection were sufficient. In any event, appellants failed to object to the portions of the charge now thought to be inadequate. Fed. R. Crim. P. 30.

ADMISSION OF CO-DEFENDANTS' S. E. C. TESTIMONY

In the course of the trial the Government read to the jury 340 pages of testimony previously given before the S. E. C. by Re, Sr., Re, Jr. and Grande. The purpose of this recital was to establish guilty knowledge on the part of those defendants. The S. E. C. testimony contained no references to Batkin. Before each defendant's testimony was read, the prosecutor stated that it was offered solely against the defendant who gave it, and the trial court, both before and after each of the three readings, specifically and thoroughly instructed the jury to the same effect. Again, in its charge, the court reiterated that such testimony could be considered "only with respect to the defendant allegedly involved in each instance and with respect to whom the testimony was received."

Batkin's unsupported claim that he was denied a fair trial because of the admission of the S. E. C. testimony is without merit. The testimony made no mention of his involvement in the conspiracy or in the substantive count. See *Delli Paoli* v. *United States*, 352 U. S. 232, 237 (1957). Moreover, the trial court made "clear and repeated admonitions to the jury at [the] appropriate times . . . [T]o say that the jury might have been confused amounts to nothing more than an unfounded speculation that the jurors disre-

garded clear instructions of the court in arriving at their verdict." *Opper* v. *United States*, 348 U. S. 84, 95 (1954); see *United States* v. *Dardi*, *supra*, 330 F. 2d at 334; *United States* v. *Aviles*, 274 F. 2d 179, 192-93 (2d Cir.), *cert. denied*, 362 U. S. 974 (1960); *United States* v. *Kaye*, 251 F. 2d 87, 90 (2d Cir.), *cert. denied*, 356 U. S. 919 (1958).

Batkin also contends that because four perjury counts based on the same testimony had been severed prior to trial it was error for the trial court to allow the transcript to be read into the record.[7] However, the ruling on the motions for severance of the perjury counts was necessarily made solely on the information contained in the indictment. The trial judge, on the other hand, had the benefit of the opening arguments and several weeks of trial. He had also examined the S. E. C. material before allowing it to be read into evidence. Under these circumstances, the trial judge was not prohibited from ruling as he did.

SUFFICIENCY OF THE EVIDENCE ON COUNTS TWO AND THREE

1. *Appellant Batkin*

The only proof in the record going directly to the allegations of count three, which charged a sale of 200 shares of Swan-Finch by Batkin and defendant Yaffe, was a stipulation of counsel. It was agreed that one Ernest Lehne of Brownton, Minnesota if called to testify would say that he purchased 200 shares of Swan-Finch from Sinclair Securities and thereafter received its confirmation of the sale through the mail. The trial court properly instructed the

[7] This testimony was the basis for counts four through eight of the indictment. See footnote 1, *supra*.

jury that it would find Batkin guilty on this count if he "acquired the stock [*i.e.*, the 200 shares sold to Lehne] from Birrell with a view to offering it to the public or participated with Birrell in the sale of the stock to the public." Batkin reasons that his conviction on this count must be reversed because there was no evidence that Birrell, the "control" person, was the source of the 200 shares. The Government concedes that it presented no proof that these 200 shares emanated from Birrell, suggesting that it had no obligation to do so because the jury could find from all the evidence that this sale was in furtherance of the conspiracy alleged in count one.

It is settled that the Government need not prove that an "underwriter" acquired the "control" shares directly from the "issuer" or control person. *S. E. C.* v. *Culpepper*, 270 F. 2d 241, 246-47 (2d Cir. 1959); see *S. E. C.* v. *Chinese Consol. Benev. Ass'n*, 120 F. 2d 738 (2d Cir.), *cert. denied*, 314 U. S. 618 (1941); *Reiter-Foster Oil Corp.*, 6 S. E. C. 1028, 1035-36 (1940). Nonetheless, there must be sufficient proof that the shares actually sold were in fact "control" shares.

While Batkin's complicity in the conspiracy may have been proven by abundant evidence, it was still necessary for the Government to establish that the transaction depicted in count three was in itself unlawful. See *United States* v. *Agueci*, 310 F. 2d 817, 828 (2d Cir. 1962), *cert. denied*, 372 U. S. 959 (1963). Since there was no evidence from which the jury could find that the 200 shares of Swan-Finch sold by Sinclair Securities came from Birrell, Batkin's conviction on count three must be reversed.

2. *Appellants Re, Jr. and Grande*

Re, Jr. and Grande also question the sufficiency of the evidence but the thrust of their argument is much different than Batkin's. They concede that Re, Sr. caused 8,900 unregistered shares of Swan-Finch to be sold on the floor of the Exchange as charged in count two and that those shares constituted "control" shares. They also admit that "there was evidence which tended to show that Gerard Re (and Grande) may have done things to facilitate the transmission of the stock through Haupt's office to the buyers. . . ." The error, they argue, is that their participation was connected not with the sale, 15 U. S. C. A. §77e(a)(1), but with the *delivery*, a different and distinct offense covered by 15 U. S. C. A. §77e(a)(2). Whatever the merits of this contention, it ignores the fact that count two also charged a violation of the aider and abetter statute, 18 U. S. C. A. §2. Thus, the court instructed the jury: "[I]f you find that the particular defendant did not himself violate the Securities Act but if you find that he aided, abetted, counseled or induced another to violate it, he is just as guilty as if he had violated the Act himself." By facilitating the transmission of the stock so as to complete the transaction, Re, Jr. and Grande associated themselves with the sale and thus could have been found to have aided and abetted Re, Sr. See *United States* v. *Campisi*, 248 F. 2d 102, 104 (2d Cir.), *cert. denied*, 355 U. S. 892 (1957); cf. *S. E. C.* v. *Culpepper*, *supra*, 270 F. 2d at 247.

THE ALLEGED MISCONDUCT OF THE RES' FORMER LAWYER

The Res seek a reversal on all counts because an attorney, a "Mr. Z,"[8] who at one time had represented them, also represented one Nahum Birnbaum, a Government witness at trial. After a thorough hearing, which included the testimony of Mr. Z, the trial court concluded that appellants' rights had not been prejudiced and that appellants had not been denied a fair trial.

Birnbaum's firm, Birnbaum & Co., was a longtime client of the law firm in which Mr. Z was a partner. In 1957, Birnbaum & Co. was a respondent, as was the Re firm, in an action in which the S. E. C. sought to enjoin the sale of Swan-Finch stock. Mr. Z appeared for Birnbaum & Co. and the Re firm was represented by another lawyer. In 1961, the Res retained Mr. Z when the S. E. C. acted to revoke their registration as broker-dealers due to their dealings in Swan-Finch stock. At that time, Mr. Z explained to the Res that his firm represented Birnbaum and that he could not take any employment that would be inconsistent with Birnbaum's representation; however, Mr. Z saw no conflict and agreed to act on behalf of the Res in the revocation proceeding. Shortly after that matter was completed, the Res were arrested on a complaint which charged market violations concerning the stock of Thompson-Starrett Company, Inc. At their request, Mr. Z appeared as attorney of record before the United States Commissioner to fix bail, and after the arraignment represented the Res at one or two conferences at the United States Attorney's Office. However, Mr.

[8] To avoid embarrassment, we join the parties in not referring to the lawyer or his firm by the correct name.

Z was soon replaced and had no further association with the Res.

Birnbaum was subsequently called to testify before the Grand Jury, but Mr. Z was involved only to the extent of arranging for the time and place of Birnbaum's appearance. Mr. Z was not present during Birnbaum's interviews at the United States Attorney's Office, and did not confer with Birnbaum about his testimony before or after it was given. After the return of the Res' indictment, Mr. Z did not discuss the case with Birnbaum, and the only connection Mr. Z or his firm had with Birnbaum's testimony at trial was supplying a photostatic copy of one of Birnbaum's records. Mr. Z testified that he never discussed with Birnbaum or any Government official any aspect of his representation of the Res. Thus, Mr. Z and his firm represented Birnbaum in connection with the Re prosecution only to the point of arranging a time and place for his Grand Jury appearance. Birnbaum continued, however, as a client of the firm.

The Government agrees that it had notice of Mr. Z's appearance for the Res and of his representation of Birnbaum. For purposes of this appeal, it assumes that the Res gave confidential material to Mr. Z.

Lacking even the most remote evidence that confidences of the Res were in fact violated, appellants invoke the proposition that where identity of subject matter of a litigation is shown, an irrebutable inference arises that a lawyer who has represented both parties will have obtained and used confidences of the former client to the detriment of that client in the pending litigation. However, assuming,

without deciding, both the correctness of this theory and its automatic applicability in a criminal case to warrant a reversal of a conviction, we do not see that it can serve appellants under these facts. In *T. C. Theatre Corp.* v. *Warner Bros.*, 113 F. Supp. 265 (S. D. N. Y. 1953), from which appellants seem to derive their theory, defendant corporation moved to disqualify a lawyer for the plaintiff who had earlier represented defendant on an appeal from an adverse judgment in an anti-trust case. The litigation then pending alleged substantially the same conspiracy found to exist in the earlier case. Thus, there was a *prima facie* violation of Canon 6 of the Canons of Professional Ethics. However, the now lawyer for the plaintiff claimed that no confidence had, in fact, been divulged. In granting defendant's motion, the court held that the former client had only to show that the "matters embraced within the pending suit wherein his former attorney appears on behalf of his adversary are substantially related to the matters . . . wherein the attorney previously represented him, the former client." 113 F. Supp. at 268. Whatever bearing that decision might have if Mr. Z had joined in the prosecution or if Birnbaum had joined forces with the Government, that is not this case. Birnbaum was not a party litigant. And, his testimony appears to have been not at all crucial. The District Court thus commented that "Birnbaum was not a prosecuting witness here. He testified with one exception as to records that were in his firm's possession." Moreover, Mr. Z's representation of Birnbaum did not extend to his appearance in the Grand Jury proceedings, when the possibility of conflicting interests first might have been detected.

or to his appearance at trial. Mr. Z, either by design or accident, was never in a position where in his representation of Birnbaum he might have made improper, if unconscious, use of confidences of his former clients. As far as the Re proceedings were concerned, Mr. Z as a practical matter had withdrawn before the possibility of conflict developed. See Canon 37, Canons of Professional Ethics.

We conclude that the conduct of Mr. Z was not improper and that appellants have failed to show that his professional relationship with Birnbaum prejudiced their defense in any manner. Their claim on this point falls well short of the mark that would justify reversing the convictions

The judgments of conviction on counts one and two are affirmed; the conviction of appellant Batkin on count three is reversed with instructions to dismiss count three of the indictment as to him.

APPENDIX B

Judgment of United States Court of Appeals

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-fourth day of July, one thousand nine hundred and sixty-four.

Present:

HON. STERRY R. WATERMAN,
HON. LEONARD P. MOORE,
HON. HOWARD J. FRIENDLY,
Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

GERARDO A. RE, also known as JERRY A. RE, GERARD F. RE, CHARLES A. OASAGRANDE, also known as CHARLES A. GRANDE, also known as CHARLES A. GRANDE, ELY BATKIN, LOWELL M. BIBRELL, et al.,

Defendants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

Appendix B—Judgment of United States Court of Appeals

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the Judgments of said District Court as to counts one and two be and they hereby are affirmed.

It is further oredered adjudged and decreed that the Judgment of Conviction of appellant Batkin as to count three be and it is hereby reversed with instruction to dismiss count three of the Indictment as to him in accordance with the opinion of this court.

A. Daniel Fusaro
Clerk

By Vincent A. Carlin
Chief Deputy Clerk

APPENDIX C

UNITED STATES CONSTITUTION

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law: nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

TITLE 15, U.S.C.

§ 78i MANIPULATION OF SECURITY PRICES

(a) It shall be unlawful for any person, directly or indirectly, by the use of the mails or any means or instrumentality of interstate commerce, or of any

facility of any national securities exchange, or for any member of a national securities exchange—

* * * * *

(2) To effect, alone or with one or more persons, a series of transactions in any security registered on a national securities exchange creating actual or apparent active trading in such security or raising or depressing the price of such security, for the purpose of inducing the purchase or sale of such security by others.

* * * * *

(6) To effect either alone or with one or more other persons any series of transactions for the purchase and/or sale of any security registered on a national securities exchange for the purpose of pegging, fixing, or stabilizing the price of such security in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

§ 78j MANIPULATIVE AND DECEPTIVE PRACTICES

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

* * * * *

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or ap-

propriate in the public interest of for the protection of investors.

§ 78k SEGREGATION AND LIMITATION OF FUNCTIONS OF MEMBERS, BROKERS, AND DEALERS

(a) The Commission shall prescribe such rules and regulations as it deems necessary or appropriate in the public interest or for the protection of investors, (1) to regulate or prevent floor trading by members of national securities exchanges, directly or indirectly for their own account or for discretionary accounts, and (2) to prevent such excessive trading or the exchange but off the floor by members, directly or indirectly for their own account, as the Commission may deem detrimental to the maintenance of a fair and orderly market. It shall be unlawful for a member to effect any transaction in a security in contravention of such rules and regulations, but such rules and regulations may make such exemptions for arbitrage transactions, for transactions in exempted securities, and, within the limitations of subsection (b) of this section, for transactions by odd-lot dealers and specialists, as the Commission may deem necessary or appropriate in the public interest or for the protection of investors.

(b) When not in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, the rules of a national securities exchange may permit (1) a member to be registered as an odd-lot dealer and as such to buy and sell for his own account so far as may be reasonable necessary to carry on such odd lot transactions, and/or (2) a member to be registered as a specialist. If under the rules and regulations of the Com-

mission a specialist is permitted to act as a dealer, or is limited to acting as a dealer, such rules and regulations shall restrict his dealings so far as practicable to those reasonably necessary to permit him to maintain a fair and orderly market, and/or to those necessary to permit him to act as an odd-lot dealer if the rules of the exchange permit him to act as an odd-lot dealer. . . .

CANONS OF PROFESSIONAL ETHICS

6. ADVERSE INFLUENCES AND CONFLICTING INTERESTS

It is the duty of a lawyer at the time of retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of counsel.

It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.

The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainer or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed.

37. CONFIDENCES OF A CLIENT

It is the duty of a lawyer to preserve his client's confidences. This duty outlasts the lawyer's employment, and extends as well to his employees; and nei-

ther of them should accept employment which involves or may involve the disclosure or use of these confidences, either for the private advantage of the lawyer or his employees or to the disadvantage of the client, without his knowledge and consent, and even though there are other available sources of such information. A lawyer should not continue employment when he discovers that his obligation prevents the performance of his full duty to his former or to his new client.

If a lawyer is accused by his client, he is not precluded from disclosing the truth in respect to the accusation. The announced intention of a client to commit a crime is not included within the confidences which he is bound to respect. He may properly make such disclosures as may be necessary to prevent the act or protect those against whom it is threatened.

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 404

GERARDO A. RE, PETITIONER

v.

UNITED STATES OF AMERICA

No. 405

GERARD F. RE, PETITIONER

v.

UNITED STATES OF AMERICA

No. 406

CHARLES A. CASAGRANDE, PETITIONER

v.

UNITED STATES OF AMERICA

No. 410

ELY BATKIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (II. 145-169)[1] is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on July 24, 1964 (II. 170). On August 19, 1964, petitioners Gerardo A. Re, Gerard F. Re, and Charles Casagrande filed separate petitions for writs of certiorari. On August 20, 1964, petitioner Batkin filed a petition for a writ of certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the fact that a witness and certain petitioners had previously been advised by the same attorney precluded the government from using the testimony of the witness.

2. Whether accounting ledgers showing cash "payoffs" were admissible under either the shop book rule or as declarations of conspirators in furtherance of the conspiracy.

3. Whether statements made by certain petitioners before the S.E.C. were properly admitted solely against the declarant.

4. Whether the statutory provisions against manip-

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[1] The certified record is in two volumes. Volume I contains the petitioners' appendix in the court below. Volume II contains the government's appendix below supplemented by the proceedings in the court of appeals.

ulating stocks is unconstitutionally vague as applied to those petitioners who were specialists.

5. Whether the statute prohibited the sale of the unregistered "control" stock involved in this case.

6. Whether the trading of stock on the floor of the American Stock Exchange was, in this case, a prohibited use of a means of communication in interstate commerce.

STATUTES INVOLVED

Pertinent parts of Sections 2, 4 and 5 of the Securities Act of 1933 [15 U.S.C. 77b(11), 15 U.S.C. 77d (1), 15 U.S.C. 77e (a) (1)], and of Sections 3 and 11 of the Securities Exchange Act of 1934 [15 U.S.C. 78c (a) (2), 15 U.S.C. 78k (b)], and 28 U.S.C. 1732 (shop book rule) are found in the appendix, *infra*, pp. 19-22.

STATEMENT

Petitioners were all convicted after a jury trial in the United States District Court for the Southern District of New York, on Count I, which charged a conspiracy to violate provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934. They were found to have sold Swan-Finch stock without filing the required registration statement, and to have used fraudulent practices to sell the stock and manipulate the market (I. 20-27, 13). Petitioners Re, Sr. (No. 404), Re, Jr. (No. 405) and Casagrande (known as Grande—No. 406) were also convicted on Count II of unlawfully selling 8,900 shares of Swan-Finch without the required registration

statement (I. 28, 13). These convictions[2] and the sentences imposed thereon were affirmed on appeal.

As background for the questions presented, the pertinent facts may be briefly summarized as follows:

Defendant, Lowell M. Birrell, who was a fugitive at the time of trial, gained control of Swan-Finch in May 1954 (II. 147, 149). Thereafter he granted Re, Sr. and Grande a three-month option to buy 10,000 shares of Swan-Finch at an unspecified price (II. 149). Re, Sr. and Re, Jr. became the specialists on the Exchange in Swan-Finch, which prior to that time had been an inactive stock (II. 5, 149). Through stock splits and various corporate acquisitions the total amount of Swan-Finch stock was increased from 34,794 shares to 2,800,000 shares (I. 40-44, II. 11-12, 150). None of the Swan-Finch stock was ever registered with the S.E.C. (II. 150).

In order to move a large volume of his stock, Birrell obtained the services of over-the-counter "boiler-

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[2] Petitioner Casagrande appealed only his conviction on the substantive Count II and not on the conspiracy Count I (Pet. 406, p. 2). Petitioner Batkin was not named in Count II. His conviction on Count III was reversed.

[3] Petitioners Re, Sr. (No. 404) and Re, Jr. (No. 405) were each sentenced to six months in jail, plus three years on probation, and were each fined $10,000 on Count I and $5,000 on Count II (I. 277-280). Petitioner Batkin (No. 410) was sentenced on the conspiracy count to six months in jail, plus probation for three years, and was fined $10,000 (I. 281-282). Petitioner Casagrande (No. 406) was placed on probation for three years and was fined $10,000 on Count I and $5,000 on Count II (I. 275-276).

room" operations including that controlled by petitioner Batkin (I. 39-40, II. 6-7, 15-16, 151-152). The Res sold a huge volume of Swan-Finch stock through use of accounts which they controlled in the names of various people (II. 13-15, 44-45, 148, 150-151, I. 81, 146-149, 150-151). Meanwhile the market on the Exchange was maintained through controlled purchasing by the Res and others (II. 149-150). For all these "services" Birrell made extensive "under the table" cash payments to the Res, Batkin and others (I. 39, 136-139, 153-155, II. 16-19, 20-32, 33-39, 48, 54-74, 111-114, 149, 152).

ARGUMENT

The sufficiency of the evidence to show a scheme to manipulate the price of Swan-Finch stock is not challenged. Some of the issues raised relate to the interpretation of the statute in the context of the special facts of the case, and others deal with evidentiary matters. All are fully answered by the decision below and none involves a conflict of circuits. There is thus no reason for review by this Court.

1. The Alleged Intrusion into the Attorney-Client Privilege.

The claim by the Res (Nos. 404 and 405)[4] that the government's use of Mr. Birnbaum as a witness involved an infringement of their attorney-client relationship is answered by the facts which were fully developed at the trial.

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[4] Each petitioner has adopted the questions presented by the others, but not all questions apply to all petitioners.

Mr. Birnbaum was a government witness who identified many records of Birnbaum & Company and testified relative to the acquisition of property by Swan-Finch, disposition of Swan-Finch stock, and his relations with Lowell Birrell (I. 40-48, II. 7-12). During the course of the examination the government sought to introduce a letter from petitioner Grande to Birnbaum, but the signature had not been reproduced on the Thermo-Fax copy used (I. 53). After Birnbaum had finished testifying the government obtained from the law firm which represented Birnbaum & Company a "photostat" which did reproduce Grande's signature (I. 53-54). At this point counsel for the Res requested a hearing claiming that their clients' rights had been violated because a lawyer from the firm that represented Birnbaum had at one time represented the Res and thus had received confidential information regarding their dealings in Swan-Finch (I. 56, 65-71, 82). The court held a hearing outside the presence of the jury. At the hearing, the attorney (called "Z" by the court below) testified that his firm had long represented Birnbaum & Company and that he represented the company in 1956 in an action to enjoin violations of the Securities Act with reference to Swan-Finch (I. 86). In that litigation the Res had been represented by other counsel (I. 87). In January, 1961, the Res retained "Z" in connection with hearings before the S.E.C. in Washington relative to the revocation of their broker-dealer license (I. 89-92). At that time the lawyer disclosed to the Res that he represented Birnbaum but said he saw no conflict (I. 100). After that mat-

ter was completed, the lawyer appeared with the Res before a United States Commissioner and had a conference with the United States Attorney's office relative to a criminal matter (I. 92-94).[3] He did not further represent the Res and did not represent the Res on the present indictment (I. 94-95).

The attorney ("Z") never discussed with Birnbaum Birnbaum's testimony before the grand jury; at most he merely arranged a time and place for Birnbaum to appear before the grand jury (I. 95-97, 103). Nor did he ever discuss Birnbaum's trial testimony with Birnbaum. He never disclosed to any government official any confidential communication received from the Res (I. 103). During the years in which the firm represented Birnbaum, other members of the firm handled other business for the Birnbaum Company during which time they obtained documents from their client (I. 88-89). Another member of the firm gave the government the copy of the document used at the trial (I. 97, 107-108).

The government attorney in charge of this litigation testified that he was aware that "Z" had previously represented the Res. Although he may have spoken with "Z", he had no conversations relative to Birnbaum (I. 105-110). Other government attorneys could not recall any conversations with the attorney relative to the substantive testimony of Birnbaum (I. 113-117, 118-119, 119-121).

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[3] The complaint involved violations relative to dealings in the stock of Thompson-Starrett Company, Inc. (see II. 142-144).

After hearing argument, the trial court concluded: that under no reasonable hypothesis could a finding be made that Birnbaum's testimony resulted from communication with "Z"; that the exhibit involved (the Grande letter) originally came from the file of Birnbaum & Company and thus was unconnected with the representation of the Res; and that, with one exception, Birnbaum had testified merely as to records of the company. Accordingly, the court found that no rights of the petitioners had been violated (I. 134).

Having failed, after a full hearing, to show that any confidences were violated, petitioners seek to invoke an "irrebuttable presumption" that the attorney's former representation of the Res made him "a potential conduit of the confidential utterances of his former clients to the ears of the witness and the prosecutor" (Pet. 404, pp. 11-12). But "Z" could not have been such a "conduit" because he never discussed Birnbaum's testimony with Birnbaum. Moreover, even if there were a conflict of interest, this cannot bar the government, which had no part in the alleged wrong-doing, from using either documentary evidence belonging to the Birnbaum Company or the testimony which Mr. Birnbaum could give on his own. In short, there cannot be an irrebuttable presumption of the kind petitioners seek to invoke in relation to a witness (in this case not even a major witness) in a criminal case. The facts here show that the government neither sought nor obtained any breach of confidence. There is thus no issue requiring review by this Court.

2. Business Records

In order to manipulate the market and profitably to distribute the shares of Swan-Finch he had obtained, Birrell made "under-the-table" cash payments according to a set formula. Curtis Whitney, who had worked for Birrell, explained that he would cash checks at the direction of Birrell, and either give the proceeds to Birrell for payment to named individuals or, under instructions, would deliver specified sums of cash in envelopes to messengers for Batkin or the Res (I. 153-155; II. 54-74). He kept track of where the money went by notations on envelopes (II. 56-57) or in the check book (II. 69; I. 164) and supplied this information to Birrell's bookkeeper, Mr. De Risi (I. 164; II. 77-87).[6]

The funds for making cash payments were drawn from checking accounts in the names of nominees (II. 78-93).[7] The bookkeeper, Mr. DeRisi, maintained books for each account, working on them two or three times a month to keep them current (I. 173). He there recorded the recipient of the cash payment as it appeared on the check book, or as he had obtained

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[6] The messenger for Batkin, Richard Orlando, and the messenger for the Res, Irwin J. Opper, both testified to picking up cash in envelopes from Whitney (II. 20-30, 33-39). The Res exchanged checks for currency without that fact appearing in any accounts (II. 44-45). There were extensive cash deposits by Batkin's company (II. 108-110, 111-114). There is some evidence that the Res sent their messenger to Birrell for an evelope with a settlement schedule attached (II. 12-15, 122-123).

[7] Some of the nominees had pre-signed checks in blank, and Whitney used these to obtain funds from the accounts (see "Espinosa," I. 139-141; "Rivero", I. 142, II. 46; "Workman", II. 74).

the name from Whitney or others (I. 175).[8] All the nominee accounts were kept the same way (I. 180-183), in the regular course of business (I. 173). On request of Mr. Birrell, the bookkeeper sometimes prepared schedules of the distribution of cash items (I. 186).

These records qualify as business records under the definition in the Federal Business Records Act, 28 U.S.C. 1732, which includes records of a "business, profession, occupation, and calling of every kind." The fact that the conspirators chose to do business on a cash basis, goes only to the personal knowledge of the maker of the records and affects their weight, not their admissibility. These accounts are in the same names that were used in the brokerage accounts for the distribution of Swan-Finch stock (I. 180-181; II. 155-156). They thus reflect the day-to-day operation of the business of distributing the Swan-Finch stock and were useful in its efficient operation. *Palmer* v. *Hoffman*, 318 U.S. 109; *United States* v. *Bernard*, 287 F.2d 715 (C.A. 7), certiorari denied, 366 U.S. 961.

While the court of appeals did not reach the alternative ground for admission, we think it manifest that these records also amounted to a cash payroll of the operation. Once the conspiracy was established, they were admissible as declarations in furtherance of the unlawful project. *Schine Theatres* v. *United States*, 334 U.S. 110, 116-117; *United States* v. *Lieb-*

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[8] The recipient was recorded as "Jerry Re" (I. 167), "Bob" (Batkin), "J.R." for Re, Sr. (I. 169-171) or "G. Re" (I. 190).

lich, 246 F. 2d 890, 893 (C.A. 2), certiorari denied, 355 U.S. 896.

3. Admission of Statements Made Before the S.E.C.

During the course of the trial the government offered the statements of Charles Grande, Re. Sr., and Re. Jr. which had been given before the S.E.C. Each was offered only against the respective maker and the trial court repeatedly admonished the jury as to their admissibility only against the maker (II. 40-44). Furthermore, in the charge to the jury the court again emphasized that these statements, which were introduced to show the consciousness of guilt of the particular defendant, were to be considered only with respect to the defendant who had made the statement (I. 262). Finally, as a precaution against any possible prejudice, all references to other defendants were deleted from the statement (II. 40). Under these circumstances, there is no merit to the claim of petitioner Batkin, who was not even mentioned in the statements, that there was error in the admission of such statements (Pet. 410, pp. 11-15). *Opper* v. *United States*, 348 U.S. 84; *Delli Paoli* v. *United States*, 352 U.S. 232.

4. The Anti-Manipulation Statute as Applied to Specialists.

The Res (Nos. 404 and 405) contend that the recognition in the Securities Act of 1934 of the function of specialists (15 U.S.C. 78k) is inconsistent with the prohibitions against manipulation (15 U.S.C. 78i) and that therefore the statute is unconstitutionally vague as applied to specialists.

One of the objects of the conspiracy charged was a violation of 15 U.S.C. 78i(a)(2) which makes it unlawful to "effect, alone or with one or more persons, a series of transactions in any security * * * creating actual or apparent active trading * * * or raising or depressing the price * * * for the purpose of inducing the purchase or sale of such security by others." It is true that a specialist who maintains the orders to buy and sell a particular stock on the exchange may be allowed, under 15 U.S.C. 78k (b), to act as a dealer in his own stock provided he shall "restrict his dealings so far as practicable to those reasonably necessary to permit him to maintain a fair and orderly market * * *." The section, however, makes it unlawful for a specialist to disclose information on his book as to the orders placed and makes it unlawful "to effect on the exchange any transaction except upon a market or limited price order."

At the specific request of the Res (II. 116-119) the jury was charged that, in applying this section to the Res, the jury was to determine whether the evidence showed they were maintaining an orderly market or whether the government had proved beyond a reasonable doubt that they were knowingly manipulating the price in violation of the statute (I. 230-231). As the court of appeals points out, the jury's verdict was a "determination that the Res were not performing the function of specialists in their dealings with Birrell in Swan-Finch" (II. 159). Petitioners' argument as to vagueness is essentially that a jury cannot distinguish between acts done in good faith and acts done in bad faith. This is the kind of

issue which a jury must pass upon in many cases and certainly in every case involving fraud. The necessity of finding intent does not render a statute vague. *United States* v. *Petrillo*, 332 U.S. 1.

The facts summarized in the opinion below (II. 149, 150) show clearly that the activities of the Res were not directed to maintaining "a fair and orderly market" but were in fact directed toward changing the price for "the purpose of inducing the purchase or sale" of Swan-Finch. Indeed the Res violated specific provisions of the statute relating to specialists by disclosing their book orders. Thus there is no real issue in this case as to legitimate action by specialists.

5. The Application of the Statute to Control Stock.

Read together Sections 4 and 5(a) of the Securities Act prohibit the public sale of unregistered securities by "an issuer, underwriter, or dealer". An "underwriter" is defined as one who offers or sells for an "issuer" or who has a direct or indirect participation in any such undertaking [15 U.S.C. 77b (11)]. An "issuer" includes "any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer" [15 U.S.C. 77b (11)].

Petitioners argue that the statute is vague since "control" or "controlling" is not defined.[9] The word

[9] The word "control stock" is not used in the act. It is a short-hand expression for stock which is subject to registration when sold by an underwriter for an issuer who is in control.

"control" as used in the Act is not a word of art. It has the ordinary meaning of being able to direct management policies through ownership or control of voting securities. See *Securities & Exchange Commission* v. *Culpepper*, 270 F.2d 241, 245, fn. 3 (C.A. 2). In this case it is conceded (Pet. 410, p. 6) that Birrell was in control of Swan-Finch. Since petitioners sold or participated in the sales for Birrell as "issuer", they are "underwriters" under the Act and were thus subject to the prohibition against the sale of the unregistered Swan-Finch stock. See *United States* v. *Crosby*, 294 F.2d 928, 939-940 (C.A. 2), certiorari denied *sub nom. Mittelman* v. *United States*, 368 U.S. 984.

Petitioners' objections to the charge (Pet. 410, p. 10) were not made at the trial (see II. 116-119) and therefore come too late. Rule 30, F.R.Crim.P. In any event, the instructions define an underwriter and not an issuer and thus properly use the statutory terms applicable to underwriters [See 15 U.S.C. 77b (11)].

6. Use of a Means of Communication in Interstate Commerce.

The Res (No. 404 and 405) and Casagrande (Pet. 406) challenge their conviction on Count II, arguing that the sale of the stock there involved, on the floor of the American Stock Exchange, did not fall within the scope of 15 U.S.C. 77e(a)(1) which prohibits the sale of unregistered securities directly or indirectly through the "use of any means or instruments of * * * communciation in interstate commerce * * *" (Pet. 405, pp. 14-16). This contention affects only the validity of the fines on Count II.

Count II of the indictment charged, in the words of the statute, that petitioners unlawfully, "directly and indirectly, made use of means and instruments of communication in interstate commerce, to wit, the facilities of the American Stock Exchange, a national securities exchange" to sell 8900 shares of unregistered Swan-Finch stock (I. 28). The bill of particulars specified that the means or instruments of communications allegedly used were the "Floor of the American Stock Exchange and the ticker-tape" (I. 274). The evidence disclosed that on April 3, 1957, while on the floor of the exchange, Re, Sr. told Townsend E. Allen, a broker on the American Stock Exchange, to sell 8900 shares of Swan-Finch for the account of Charles Grande (I. 146). After having the order recorded by his firm (I. 147, 149-150), Allen went to Re's post, since Re was the specialist in Swan-Finch, and orally announced that he had 8900 shares of Swan-Finch to sell. Re, Sr. proceeded to sell 7900 shares from previously received orders in his book, and Allen sold the remaining 1,000 shares to others standing nearby (I. 147-148). Like every other sale on the Exchange, the sale was reported on the nationwide ticker-tape (II. 49-51).

The court below properly held that a transaction on the floor of the national stock exchange, the market place and nerve center of national financial activity, involves the use of a means of communication in interstate commerce within the purview of Section 5(a)(1) of the 1933 Act. The American Stock Exchange is a vital link in the thread of the nationwide communication used in securities transactions—indeed it

is a nerve center of the nationwide market. As such, no sale on the floor of the exchange is possible without at least the indirect use of some means of communication in interstate commerce—which is one of the explicit bases for invoking federal jurisdiction under the Securities Act of 1933.

The Act as a whole makes plain that Congress intended to exercise the full extent of federal power in order to prevent the instrumentalities of interstate commerce from being used in the unlawful sale of securities. See *Schillner v. H. Vaughan Clarke & Co.*, 134 F.2d 875, 878 (C.A. 2). The broad language of prohibiting "directly or indirectly" the use of "any" means or instruments of communication in interstate commerce, is clearly designed to effectuate this broad power. The oral instructions and oral trade on the floor cannot be treated in isolation, separate from the whole system of the exchange of which they are a part.

That the exchange itself could be regarded as a means or instrument of communication was specifically recognized by the S.E.C. in *Brooklyn Manhattan Transit Corp.* 1 S.E.C. 147, 173 (1935). This early construction of the act by those responsible for making it work is entitled to great weight. See *F.T.C. v. Mandel Brothers*, 359 U.S. 385, 391; *United States v. Chicago North Shore R. Co.*, 288 U.S. 1, 13-14; *Great Northern Ry. Co. v. United States*, 315 U.S. 262, 275, see also Loss, *Securities Regulation* 1520-1521, fn. 4 (2d ed., 1961).

Petitioners cite no cases or authorities to the contrary. Their main argument is that subsequent legis-

lation, the Securities Exchange Act of 1934, shows that the 1933 Act had a narrower compass. The 1934 Act prohibits acts which involved "the use of the mails," or "any means or instrumentality of interstate commerce," or "of any facility of any national securities exchange." The term "facility" is defined to include the "premises, tangible or intangible property whether on the premises or not, any right to the use of such premises or property or any service thereof for the purpose of effecting or reporting a transaction on an exchange,"—including *inter alia* a ticker-tape. The inclusion of all these aspects of an exchange beyond the floor of the exchange itself, some of which may well be said to go beyond the direct or indirect use of "any means or instruments of transportation or communication in interstate commerce" (the 1933 Act definition), neither enlarges nor diminishes the scope of the 1933 Act. Certainly, for example, a nationwide ticker is a means of interstate communication under the 1933 Act, even though it is also a facility of a national securities exchange under the definitions of the 1934 Act. Indeed, if the 1934 Act proves anything with respect to the 1933 Act, it shows that Congress specifically recognized that national exchanges were actually a means of interstate commerce and that Congress sought in 1934 to cover anything that might affect that means. Considering the broad purpose of the 1933 Act to cover national dealing in stock, the 1934 Act tends to confirm, rather than to negate, the view that the floor of the Exchange is an instrumentality of communication in interstate commerce.

Furthermore, we think it manifest that the Res and Grande recognized that the ticker-tape would be an inevitable part of this transaction. Indeed the conspirators' use of boiler-room facilities for other trading accentuates the recognition that this particular sale was to be handled in such a way that it would be reflected on the national market. Thus this sale, like all sales on the Exchange, contemplated the use of a means of communication in interstate commerce.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for writs of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

HERBERT J. MILLER, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
THEODORE GEORGE GILINSKY,
Attorneys.

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APPENDIX

STATUTES INVOLVED

Section 2 paragraph 11 of the Securities Act of 1933, 48 Stat. 74, 75, as amended, 68 Stat. 683, 684, provides [15 U.S.C. 77b(11)]:

> The term "underwriter" means any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking; but such term shall not include a person whose interest is limited to a commission from an underwriter or dealer not in excess of the usual and customary distributors' or sellers' commission. As used in this paragraph the term "issuer" shall include, in addition to an issuer, any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer.

Section 4 of the Securities Act of 1933, as amended, 68 Stat. 684, provides in pertinent part [15 U.S.C. 77d(1)]:

> *Exempted transactions.*
>
> Sec. 4. The provisions of section 5 shall not apply to any of the following transactions:
>
> (1) Transactions by any person other than an issuer, underwriter, or dealer; * * *

Section 5 of the Securities Act of 1933, 48 Stat. 77, as amended, 68 Stat., 684 provides in pertinent part [15 U.S.C. 77e(a)]:

> Sec. 5. (a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—
>
> (1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or

Section 3(a)(2) of the Securities Exchange Act of 1934, 48 Stat. 882, provides in pertinent part [15 U.S.C. 78c(a)(2)]:

> The term "facility" when used with respect to an exchange includes its premises, tangible or intangible property whether on the premises or not, any right to the use of such premises or property or any service thereof for the purpose of affecting or reporting a transaction on an exchange (including, among other things, any system of communication to or from the exchange, by ticker or otherwise, maintained by or with the consent of the exchange), and any right of the exchange to the use of any property or service.

Section 11(b) of the Securities Exchange Act of 1934, 48 Stat. 891 provides in pertinent part (15 U.S.C. 78k(b)]:

> When not in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, the rules of a national securities exchange may permit (1) a member to be registered as an odd-lot dealer and as such to buy and sell for his own account so far as may be reasonably necessary to carry on such odd-lot transactions, and/or (2) a member

to be registered as a specialist. If under the rules and regulations of the Commission a specialist is permitted to act as a dealer, or is limited to acting as a dealer, such rules and regulations shall restrict his dealings so far as practicable to those reasonably necessary to permit him to maintain a fair and orderly market, and/or to those necessary to permit him to act as an odd-lot dealer if the rules of the exchange permit him to act as an odd-lot dealer. It shall be unlawful for a specialist or an official of the exchange to disclose information in regard to orders placed with such specialist which is not available to all members of the exchange, to any person other than an official of the exchange, a representative of the Commission, or a specialist who may be acting for such specialist; but the Commission shall have power to require disclosure to all members of the exchange of all orders placed with specialists, under such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors. It shall also be unlawful for a specialist acting as a broker to effect on the exchange any transaction except upon a market or limited price order.

Section 1732 of Title 28 provides in pertinent part:

In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regu-

lar course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

The term "business," as used in this section, includes business, profession, occupation, and calling of every kind.

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